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THE address, of the venerable David Dudley Field, at the recent meeting of the American Bar Association, contains some very wholesome truths concerning the administration of justice in this country. He affirms that behind our boasting of the great things we have accomplished, and are doing "there stands a spectre of halting justice, such as is to be seen in no other part of christendom." There is no other country calling itself civilized, he goes on to say, where it takes so long to punish a criminal, and so many years to get a final decision between man and man. This is a strong assertion, but it is made by a man of long experience as a practitioner, and the observation of us all confirms it. "Truly may we say," he continues, "that justice passes through the land on leaden sandals," and the records of courts will fully substantiate the assertion. Our courts, as a rule, delay rather than hasten the enforcement of the laws. Often, in fact, they entirely prevent such a result and cause injustice to be done under pretence of superior care and integrity. When a man goes to law he has no assurance when the end will be reached. He is at the mercy of innumerable precedents and technicalities, which are designed apparently to prolong the proceedings; and no matter how simple the issue may be, the chances are all against a prompt and inexpensive trial.

MR. FIELD practically ascribes this condition of things to the fact that we have too many lawyers. According to his idea, the profession is so crowded, that it can prosper only by keeping cases in court as long as possible, instead of trying to dispose of them in an expeditious manner. Thus, the resourses of legal ingenuity have deen drawn upon for all sorts of hindrances to early trials, and the courts complacently favor the system and aid in making business for the attorneys at the expense of helpless litigants. We have 70,000 lawyers in the United States, whereas France has only 8000, and Germany only 7000. That is to say, the proportion of lawyers to the whole population is, in round numbers, 1 to 6400 in Germany, 1 to 4700 in France, and 1 to 900 in the United States. It is not to be believed for a moment that we really require so much more legal talent than other countries. Our ratio of crime as compared with theirs does not call for any such excess of lawyers; nor is a good reason to be found for it in a great preponderance of civil suits. The truth is, we do not have legitimate employment for so many men in that profession. They are obliged to live, and the consequence is that they gain fees by methods which necessarily obstruct and delay the course of justice. There is nothing more desirable than speedy justice. That we do not have it in this country every intelligent lawyer will admit. Mr. Field assures us that the reason lies mainly in our superfluity of lawyers.

THOUGH there doubtless is much truth and force in the reason assigned by Mr. Field, yet it will not do to ignore the fact, that if the laws pertaining to practice were what they should be, it would not be within the power, of this unnecessary army of lawyers, to delay and hinder justice as they are charged with doing. And therefore, the real cause of this admitted legal defect must be in the laws themselves. By absolutely securing the early and prompt trial of causes, even the hungriest practitioner cannot delay them. By making continuances impossible except where absolutely required for the purposes of justice, a prolific source of delay will be removed. By so relieving the dockets of appellate courts as to secure an early hearing therein, and requiring the prompt disposition of cases there, a large part of the delay which litigants now suffer will be avoided. In short, if the laws secured and the courts enforced speedy and prompt justice, it would be without the power of attorneys to prevent it. In fact, such a condition of things would, in itself, tend to decrease the number of lawyers, the supply of whom Mr. Field thinks far beyond the demand.

ON this general subject the paper of Mr. Edward Cahill on "How can the Supreme

Court Docket be relieved" which appears on page 329 of this issue will be found interesting and novel. There is certainly much ground to believe, with him, that it was not the original contemplation of the framers of the constitution that the federal courts should have jurisdiction over purely private controversies between citizens of different States, this feature being a concession made to the weaker States. And it may be, that the best way to solve the perplexing problem is to withdraw the jurisdiction, which attaches simply on the ground of residence or, at least, to make the jurisdictional amount in such cases so large that it will practically keep out the majority of such cases. It is undoubtedly the fact, that a large part of the litigation which comes into the supreme court, is of this character and therefore, it would seem that the remedy proposed would be effective. At the same time, the article itself bears testimony to the soundness of the position we have heretofore taken, that under the restrictions imposed by the act of 1887 the number of cases on the circuit court dockets and which may from time to time go to the supreme court, is materially decreased and that before an effective remedy has been adopted the trouble may have disappeared.

NOTES OF RECENT DECISIONS.

THE power of a court of equity to direct an assessment upon stock in a corporation was well considered by the Supreme Court of the United States, in Hawkins v. Glenn. It was there held that a court of equity, at the suit of creditors of an insolvent corporation which has made an assignment, but which by statute still exists as a corporation for the purposes of collecting debts and enforcing its liabilities, in which suit the corporation and the trustees are made parties defendant, may by its decree direct a stock assessment for the benefit of creditors, which will bind stockholders who are not individually parties to the suit. In such case, no previous call having been made by the corporation, the statute of limitations does not begin to run against the stockholder's liability on his subscription until the date of the decree ordering the assessment. Mr. Chief Justice Fuller says:

Under the charter of this company a call could only be made by the president and directors, and was a corporate question merely, and in the situation of the company's affairs it was a duty to make it, failing the discharge of which by the president and directors, creditors could set the power of a court of equity in motion to accomplish it. Executing in that regard a corporate function for a corporate purpose, it is difficult to see upon what ground it could be held that the court could not order an assessment operating upon stockholders, who would be bound if the president and directors had ordered it. Sued after such an order of court, the defendant does not deny the existence of any one of the facts upon which the order was made but contends that there has been no call as to him, because he was not a party to the cause between creditor and corporation. We understand the rule to be otherwise, and that the stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member. Sanger v. Upton, 91 U. S. 56, 58, in which case it is also said: "It was not necessary that the stockholders should be before the court when it [the order] was made, any more than that they should have been there when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not, in this action, question the validity of the decree; and for the same reasons she could not draw into question the validity of the order. She could not be heard to question either, except by a seperate and direct proceeding had for that purpose." As against creditors, there is no difference between unpaid stock "and any other assets which may from a part of the property and effects of the corporation," (Morgan Co. v. Allen, 103 U. S. 498, 509); and "the stockholder has no right to withhold the funds of the company upon the ground that he was not individually a party to the proceedings in which the recovery was obtained." Glenn v. Williams, 60 Md. 93, 116. In the last-cited case, which was an action to recover upon the assessment controverted here, the court of appeals of Maryland passed upon the question now before us, and held, in an able opinion by Alvey, J., that the Richmond chancery court acquired jurisdiction over the express company and the trustee; that that court had power and jurisdiction to make assessments upon the unpaid subscriptions to raise funds to pay the corporation's debts and its decree making such assessment was binding and effective "upon the stockholders who were not in their individual capacities parties to the cause;" that Glenn was legally appointed trustee; and that the statute of limitations began to run only from the time the assessment was made by the decree of the court in Virginia, and could form no bar to the right to recover in the action. Sanger v. Upton, *supra*, is quoted from, and it is correctly stated that that decision "was made, not in pursuance of any express provision of the bankrupt law, but in analogy to the powers and procedure of a court of equity, and to meet the requirements and justice of the case." In Hambleton v. Glenn, 9. S. E. Rep. 129, the rejection by the circuit court of Henrico county, Va., to which the suit in the Richmond chancery court had been removed, of a

petition of certain stockholders to be made parties, and for a rehearing of the cause, came under review in the supreme court of appeals of Virginia, and that court, among other things, said: "The first question raised in this court is that the appellants are entitled to be made parties to the suit of Glenn v. National Express & Transportation Company, because the relief sought is against them. The suit of Glenn v. National Express & Transportation Company is a creditor's suit against a corporation, and by the terms of its charter and the laws of this State applicable to said company, it was lawfully sued as such by its corporate name, and the individual stockholders were not proper parties to such a suit, the president and directors being by their selection their representatives for this purpose. The appellants admit this as to any live and going corporation, and claim that, as the corporation is dead, by its deed in trust it assigned to trustees and ceased to exist; that in a suit by a creditor, or by creditors generally, the suit against the corporation is in fact one not against the corporation but against them as stockholders, and they are not represented by the company, nor by the trustees. By the law of this state (Code 1873, c. 56, § 31), 'when any corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property, and debts due to it, shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities, and distributing the proceeds of its works, property, and debts, among those entitled thereto.' By which it is provided, that, notwithstanding its death, it stands, for the purpose of being sued by creditors, just as it did while live and going, and may sue and be sued as before, and that the directory has assigned to trustees alters the case only so far as to make the trustees necessary parties."

The section quoted from the Code of 1873 is identical with section 30, ch. 56, Code 1860; and as the corporation, notwithstanding it may have ceased the prosecution of the objects for which it was organized, could still proceed in the collection of debts, the enforcement of liabilities, and the application of its assets to the payment of its creditors, all corporate powers essential to these ends remained unimpaired. We concur in the decision to this effect of the highest tribunal of the State were the corporation dwelt, in reference to whose laws the stockholders contracted, (Railroad Co. v. Gebhard, 109 U. S. 527, 3 Sup. Ct. Rep. 363,) and in whose courts the creditors were obliged to seek the remedy accorded. Barclay v. Talman, 4 Edw. Ch. 123; Bank v. Adams, 1 Pars. Eq. Cas. 534; Patterson v. Lynde, 112 Ill. 196. We think it cannot be doubted that a decree against a corporation in respect to corporate matters such as the making of an assessment in the discharge of a duty resting on the corporation, necessarily binds its members, in the absence of fraud, and that this is involved in the contract created in becoming a stockholder.

THE duty required of one crossing a railroad track to look and listen was discussed by the Supreme Court of Illinois in Terre Haute & I. Ry. Co. v. Voelker. It was there laid down that it cannot be said, as a matter of law, that the failure to look and listen before crossing a railroad track is negligence *per se*. The question of contributory negligence arising from such omistion is one of fact for the jury. The court says:

The proposition raised by both of these instructions and upon which the circuit court ruled against the defendant, was that going upon a railway track at the point where it crosses the highway or street, without looking or listening for approaching trains, is negligence *per se;* and that such conduct, in case of an injury at such crossing, constitutes such contributory negligence as will bar a recovery therefor. It has been the uniform doctrine of this court that negligence is ordinarily a question of fact for the jury. Doubtless there may be conduct so clearly and palpably negligent that all reasonable minds, without hesitation or dissent, would so pronounce it. When that is so the inference of negligence may properly be said to be a necessary one, and such conduct may be treated as negligent *per se*. But, as said in Railroad Co. v. Maugans, 61 Md. 53: "When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ." See, also, Railroad Co. v. Owings, 65 Md. 502, 5 Atl. Rep. 329. It has frequently been said in judicial decisions in this State and elsewhere that it is the duty of persons approaching a railway crossing to look and listen before going upon the track, and that their failure to do so is negligence; but it will be found generally, though not uniformly, on examining the case where such language occurs, that it has been used in discussing the duty as to care and caution in approaching a railway crossing, viewed as a mere question of fact, and not as a question of law. It is doubtless a rule of law that a person approaching a railway crossing is bound in so doing, to exercise such care, caution and circumspection to foresee danger and avoid injury as ordinary prudence would require, having in view all the known dangers of the situation; but precisely what such requirements would be must manifestly differ with the ever-varying circumstance under which such approach may be made. Ordinarily, of course, the diligent use of the senses of sight and hearing is the most obvious and practiable means of avoiding injury in such cases; but occasions may, and often do, arise where the use of those senses would be unavailing, or where their nonuse may be excused. The view may be obstructed by intervening objects, or by the darkness of the night. Other and louder noises, as is often the case in a city, may confuse the sense of hearing, and render its use impracticable. The railway company, by its flagman or other agent or agency, may put the person off his guard, and induce, him to cross the track without resorting to the usual precautions. The duty may be more or less varied by the age, degree of intelligence, and mental capacity of the party, and by a variety of other circumstances by which he may be surrounded. It follows that no invariable rule can be predicated upon the mere act of failing to look or listen, but a jury properly instructed as to the legal duty, in respect to care and caution, of a person approaching a railway crossing, must draw from such

act, in connection with all the attendant circumstances, the proper conclusion as to whether he is guilty of negligence or not.

Mr. Bishop, in his recent treatise on Non-Contract Law, § 1043, after referring to the decisions which seem to hold that the duty to look and listen is an absolute one, and that its omission is negligence *per se*, says: But it is believed that most courts more accurately regard this sort of matter as mere evidence, like any other in the case; submitting all with proper instructions, to the jury, yet with the exceptions recognized in the general law of negligence. To omit looking and listening, where neither can do any good,—as where the track is hidden from sight, and other sounds drown the noise of the cars,—is not contributory negligence, and there are other circumstances in which the rule of looking and listening cannot, in the nature of this sort of thing, be inflexible. Therefore to go upon the track in disregard of it is not necessarily, and as a question of law, negligence." In Railway Co. v. Chapman, 57 Tex. 75, it was held that a person approaching a railway track at a road crossing is bound to use such precautions as a prudent man would resort to under like circumstances, but any attempt by the court to prescribe the precise thing he should do in exercising such caution would be an invasion of the province of the jury, by charging on the weight of evidence. In Laverenz v. Railroad Co., 56 Iowa, 689, 10 N. W. Rep. 268, the court, after reviewing various authorities, says: "These, and many other cases which might be cited, establish the doctrine beyond question that a person is not necessarily, and as a question of law, negligent in going upon a railroad track without looking and listening for approaching trains." In Plummer v. Railroad Co., 73 Me. 591, it is held that the fact that a person who, in attempting to cross a railroad, does not at the instant of stepping on it, look to ascertain if a train is approaching, is not conclusive of a due want of care on his part.

The foregoing authorities are entirely in harmony with repeated decisions of this court, but as the contrary doctrine is very strenuously insisted upon by counsel for the defendant in this case, we have been disposed to discuss the question more at length than the condition of the decisions in this State would otherwise have seemed to demand. In Pennsylvania Co. v. Frana, 112 Ill. 398, the trial court refused to instruct the jury that it was the duty of a person, before attempting to cross a railway track, to stop, if necessary, and look and listen for the approach of trains, before entering upon such track, and that if, by such precautions, he could have discovered the approach of the defendant's train, and avoided the injury, he could not recover. In affirming the judgment we said: "It is no doubt true that it is the duty of a person about to cross a railroad track to approach cautiously, and endeavor to ascertain if there is present danger in crossing; and, where the railroad track and crossing are so situated that the approach of a train cannot be seen, it may be the duty of a person about to cross to stop and look, to ascertain if a train is coming; but it is always a question of fact for the jury to determine from the evidence, whether the person injured has exercised proper care and caution in crossing a railroad track, and not a question of law. It was the province of the jury to determine whether the plaintiff was guilty of negligence, and not for the court to tell the jury that certain facts constituted negligence." In Railroad Co. v. O'Connor, 119 Ill. 586, 9 N. E. Rep. 263, in discussing the same proposition, we said: "It is only when the conclusion of negligence necessarily results from the statement of fact that the court can be called upon to say to the jury that a fact establishes negligence as a matter of law. If the conclusion of negligence, under the fact stated, may or may not result, as shall depend on other circumstances, the question is one of fact for the jury." See, also, Railroad Co. v. Pennell, 94 Ill. 448; Schmidt v. Railway Co., 83 Ill. 405; Railway Co. v. Moranda, 108 Ill. 576.

THE right of a defendant on trial for murder to introduce negative evidence of good character was conceded by the Supreme Court of Alabama in Hussey v. State, where it was held error to refuse to permit the defendant, in an indictment for murder, in introducing evidence of his good character, to ask the witness if he had "ever heard of the defendant having any other difficulty except the one in question;" as it is equivalent to the inquiry whether the witness had ever heard anything against the character of the defendant for quiet, peace, or good order. This evidence, though negative in form, is often more satisfactory than positive evidence. The court says:

The rulings of the court below raise in this case a question of evidence which is of great importance, as it occurs to us, in the practical administration of justice. It involves the right of a defendant to introduce negative testimony in support of his good character,—a right which does not seem to be recognized by the old text-writers and authorities, but may be said to be accorded from necessity almost universally by the *nisi prius* courts in the trial of causes. The defendant was allowed to prove his good character generally for peace and quiet,—an issue having reference to the nature of the charge against him, which was murder. Two witnesses were asked the question whether they had "ever heard of the defendant having any other difficulty except the one in question?" This question was objected to by the State, and on such objection was excluded. There is good authority in support of this ruling of the circuit court, but we are all of one opinion, that the question should have been allowed. Bare evidence by a witness that he knows the general character of a given person, and it is good, or very good, or excellent, is, after all, closely analogous to a mere opinion in the nature of a fact, and, standing alone, carries with it an impression that it is lacking in some element to give force to the statement. The party testifying can render it more satisfactory and convincing by showing the foundation on which it rests. It is well to prove a person to be reputed honest, or truthful, or a woman chaste, or a man loyal to his country, or peaceably disposed towards all his neighbors. But great emphasis is added by the declaration that the witness, who has had every opportunity to know, has never heard any human being challenge the honesty or veracity of the one, or breathe the slightest breath of suspicions on the virtue of the other, or assert any fact which goes to deny the loyalty or question the humanity and orderly conduct of the third. It is only to put the matter in a slightly different form to inquire of the deposing witness whether he had ever heard of any act or conduct

in refutation of the good repute which he has affirmed of the person in question. To say his character is good is a positive expression of the fact. To say that the witness has never heard anything against his character, as to the particular phase in which it is put in issue, is negative in form, but often more satisfactory than evidence of a positive character.

The propriety of this rule, permitting negative evidence of good character, is gradually forcing itself upon the recognition of the courts, and there is a current of modern authority rapidly forming in support of it.

Mr. Taylor, in his work on Evidence, after observing that the term "character" is not synonymous with "disposition," but simply means "reputation," or the general credit which a man has obtained in public opinion, observes as follows of the practice of the English judges on this point; "Aware that 'the best character is generally that which is the least talked about, they have found it necessary to permit witnesses to give negative evidence on the subject, and to state that they never heard anything against the character of the person on whose behalf they have been called.' Nay, some of the judges," he continues, "have gone so far as to assert that evidence in this negative form is the most cogent proof of a man's good reputation." 1 Tayl. Ev. § 350. In support of this view he cites the late case of Reg. v. Rowton, 10 Cox, Crim. Cas. 25, where Cockburn, C. J., observes: "I am ready to admit that that negative evidence to which I have referred, of a man saying, 'I never heard anything against the character of the person of whose character I come to speak,' should not be excluded. I think, though it is given in a negative form, it is the most cogent evidence of a man's good character and reputation, because a man's character does not get talked about till there is some fault to be found with him. It is the best evidence of his character that he is not talked about at all. I think the evidence is admissible in that sense."

Mr. Wharton recognizes the same principle, and says: "In view of the fact that 'the best character is generally that which is the least talked about,' the courts have found it necessary to permit witnesses to give negative evidence on the subject, and to state that 'they never heard anything against the character of the person on whose behalf they have been called.'" Whart. Crim. Ev. (8th Ed.) § 58; 1 Whart. Ev. § 49; and to the same purport, in view of Mr. Bishop, 1 Bish. Crim. Proc. (3d Ed.) § 1117.

A well-considered case in direct support of this doctrine, is that of State v. Lee, 22 Minn. 407, where Berry, J., observes. "A very sensible and commendable instance of the relaxation of the old and strict rule is the reception of negative evidence of good character; as, for example, the testimony of a witness who swears that he has been acquainted with the accused for a considerable time, under such circumstances that he would be more or less likely to hear what was said about him, and has never heard any remark about his character,—the fact that a person's character is not talked about at all being, on grounds of common experience, excellent evidence that he gives no occasion for censure, or, in other words, that his character is good." It was held accordingly that a witness might, when a proper predicate of knowledge had been laid, be permitted to testify negatively to one's good character by affirming that he had never heard his character discussed or spoken of by any one.

To the same effect is Gandolfo v. State, 11 Ohio St. 114, where negative evidence of a defendant's good character was allowed to be given. "Such evidence," it was said, "is often of the strongest description as, where a character for truth is in issue, that among those acquainted with the party it has never been questioned; and so, as to character for peace and quietness, that among those with whom the party associates no instance has been known or heard of in which he has been engaged in a quarrel.

In State v. Nelson, 58 Iowa, 208, 12 N. W. Rep. 253, the same rule was recognized, and a witness was allowed to testify that he had never heard anything against the defendant's character or reputation; the court observing that, in the absence of such a rule, "the person who had so far lived a blameless life as to provoke but little discussions respecting his character would oftentimes be utterly unable to support his character when assailed."

So in Davis v. Foster, 68 Ind. 238, an instruction to the jury was held good which asserted that "if a man's neighbors say nothing whatever about him, as to his truthfulness, that fact of itself is evidence that his general reputation for truth is good."

And in Davis v. Franke, 33 Grat. 413, a witness who had an opportunity to know another's character was allowed to testify that he never heard it called in question; Staples, J., observing: "Possibly in many cases the highest tribute that can be paid to the witness is that his reputation as a man of veracity is never called in question, or even made the subject of conversation in the community where he resides."

In Childs v. State, 55 Ala. 28, a witness, who claimed to know the character of another witness, "but never heard his character discussed," was held competent to speak to the question of character. A like principle was declared in Hadjo v. Gooden, 13 Ala. 718.

Under the principle established by these authorities we hold that the circuit court erred in excluding the question propounded as to whether the two witnesses named in the record had ever heard of the defendant's having any other difficulty except the one in question. It was equivalent to the inquiry whether the witnesses had ever heard anything against the character of the defendant for quiet, peace, or good order, and should have been allowed by the court. The question propounded calling for evidence *prima facie* relevant and legal, the refusal to allow it was error, although no answer, or proposed answer, of the witnesses was stated. Insurance Co. v. Moog, 78 Ala. 284.

JUDGE THAYER, of the United States Circuit Court, recently held, in City of St. Louis v. Western Union Telegraph Co., that telegraphs, being instruments of interstate commerce, and defendant's lines in the city of St. Louis being used for transmission of messages to all parts of the United States neither the State nor the city can impose a privilege or license tax upon defendant. A tax of five dollars per year upon every telegraph pole used by defendant in the city cannot be upheld under the city's charter power "to regulate" telegraph companies.

TRUSTEES AND CESTUIS QUE TRUST AS PARTIES.

The general rule of equity practice is to require all parties interested, both trustees and *cestuis que trust*, to be before the court, either as plaintiffs or defendants, before the court will proceed to a decree affecting their rights, but whether the *cestuis que trust* shall be made parties is, within limits, a matter of discretion with the court.[1]

The general rule stated above has a number of exceptions, so far as making *cestuis que trust* parties is concerned, and among them one of the most firmly fixed is where the trustee is authorized to represent the *cestui que trust*, particularly where the trustee is created to hold the security for a large issue of bonds payable to bearer.

In Kerrison v. Stewart, the question was whether the appellants were concluded by a decree obtained by the appellee against their trustee in a State Court. Chief Justice Waite, speaking for the court, says: "It cannot be doubted, that, under some circumstances, a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers, and subjected to such obligations that those for whom he holds, will be bound by what is done against him, as well as by what is done by him. The difficulty lies in determining he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust (citing cases); or to one by a stranger against him to defeat it in whole or in part (citing cases). In such cases the trustee is in court for, and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party. The principle which underlies this rule has always been applied in proceedings relating to railway mortgages, where a trustee holds the security for the benefit of bondholders. It is not, as seems to be supposed, by the counsel for the appellants, a new principle developed by the necessities of that class of cases, but an old one, long in use under analagous circumstances, and found to be well adopted to the protection of the rights of these interested in such securities, without subjecting litigants to unnecessary inconvenience."

In Vetterlein v. Barnes,[3] an action was brought to collect the proceeds of an insurance policy, payable to the deceased, but assigned by him in his life time to trustees for the benefit of his wife and children. The action was brought against the trustees alone, and it was objected that the wife and children ought to have been made parties but the court ruled otherwise, approving the doctrine laid down in Kerrison v. Stewart.[4]

It is held in New Jersey Franklinite Co. v. Ames,[5] that, in case a trustee is created to hold the security for an issue of bonds payable to bearer, a final decree "settling the rights of all parties to the controversy may be made without bringing such *cestui que trusts* before the court." "The very fact that trustees are interposed to receive and hold the mortgage given to secure an issue of bonds, sometimes amounting to hundreds and thousands, and transferable by delivery, shows that it is the intent and understanding of all parties, unless the contrary appears, that the trustees are to represent the bondholders in all matters of litigation respecting their common and general rights."[6]

In Corcoran v. Canal Co.,[7] it was contended by the appellant that he was not bound in his individual character as owner of certain bonds and coupons, although there was a decree against him as trusee. The court say: "But why is he not bound? It was his duty as trustee to represent and protect the holders of these bonds; and for that reason he was made a party, and he faithfully discharged that duty. It would be a new and a very dangerous doctrine in the equity practice to hold that the *cestui que trust* is not bound by the decree against his trustee in the very matter of the trust for which he was appointed. If Corcoran owned any of these bonds or coupons, then, he is bound, because he represented himself. If he has bought

[1] Vetterlein v. Barnes, 124 U. S. 169, 172, and cases there cited: Story's Eq. Pl. (9th ed.) §§ 135, 135*a*; Kerrins v. Stewart, 93 U. S. 155.

[2] 93 U. S. 155.

[3] 124 U. S. 169.

[4] *supra*.

[5] 1 Beasley, N. J. 507.

[6] Campbell v. R. R. Co., 1 Woods, 376.

[7] 94 U. S. 741.

them since, he is bound as privy to the person who was represented.

In Richter v. Jerome,[8] the question was whether the bondholders of an issue of bonds payable to bearer, were concluded by a decree against their trustee. The court say: "As bondholders claiming under the mortgage, they can have no interest in the security, except that which the trustee holds and represents. If the trustee acts in good faith, whatever binds it in any legal proceedings, it begins and carries on to enforce the trust, to which they were not actually parties, binds them (citing cases). Whatever forecloses the trustee, in the absence of fraud or bad faith, forecloses them. This is the undoubted rule."

In Coal Co. v. Blatchford,[9] it was objected that the plaintiffs, trustees holding the mortgage security to secure an issue of bonds, were not *real* parties; the right to transfer the cause to the United States Court depending upon the citizenship of the real parties. The court say: "In the case at bar the plaintiffs are the real prosecutors of the suit. * * So long as they do not refuse to discharge the trust reposed in them, other parties are not authorized to institute or prosecute any proceedings for the enforcement of the mortgage, or to exercise any control over them."

It was held in Knapp v. R. R. Co.,[10] that a statute authorizing the appointment of a new trustee to hold the security of an issue of bonds, payable to bearer, without the consent of a bondholder, where the trust was created prior to the statute, impaired the obligation of the contract. The court say: "The salability of railroad bonds depends in no inconsiderable degree upon the character of the persons selected to manage the trust. If these persons are of well known integrity and pecuniary ability, the bonds are more readily sold than if this were not the case. It is natural that this should be so, and on this account the trustees usually appointed in this class of mortgages are persons of good reputation in the cities where these bonds are likely to sell. To change them is to change the contract in an important particular, and this cannot be done without the consent of the parties for whose benefit the trust was created. * * It can make no difference whether these bonds [those outstanding] are few or many. The trust is continuing until all are paid. * * They [the trustees], are the real plaintiffs in any suit brought to enforce a claim accruing to them in the execution of their trust, as much so as executors or administrators are, who also sue for the benefit of others, and not themselves. Like them they control the litigation, and are charged with the responsibility of controlling it."

Upon the strength of the doctrine of the case last cited, the Supreme Court of Indiana, has held that the foreign trustee act of 1879 could not constitutionally be given a retrospective operation. The court uses the following language in Rinker v. Bissell: "In this class of cases, the trustee becomes the legal representative of the *cestui que trust*, and is charged with the responsibility of all litigation which arises in the enforcement of the trust. It is therefore proper that he should be permitted to control such litigation as affects the trust property." For these conclusions the court cites Knapp v. R. R. Co.[12]

McElrath v. Pittsburg, etc. R. R. Co.,[13] was a case where the payment of certain railroad bonds had been postponed, by decree, as was claimed erroneously, until the payment of certain other bonds. The holders of the bonds first mentioned attacked the decree on the ground that they had not been made parties, as well as their trustee. The court say: "The bondholders in such a mortgage as this are not the parties to it, though they have rights under and claim through it. The true party is the trustee to whom it was given as the security for all the bonds issued under it. It would be impossible, and if possible excessively inconvenient, to make all parties holding the bonds, which are separate instruments, parties to the decree of foreclosure and sale under the mortgage. The bonds are payable to bearer, and pass by delivery, and who the holders are after they pass into the current of business cannot be told. Hence, the trustee is the party to be summoned to defend the interest of those who

[8] 123 U. S. 233, 246.
[9] 11 Wall. 172.
[10] 20 Wall. 117.
[11] 90 Ind. 375, 379, 380.
[12] *supra*.
[13] 68 Pa. St. 37.

claim under the mortgage. The bondholders are privies in interest, and may come in to defend *pro interesse suo*, but their rights are affected by the decree against their trustee."

In Board v. R. R. Co.,[14] the bill alleged that the bondholders, and the extent of the issue of the bonds were unknown. The court say: "Now the general rule in equity is undoubted, that, in suits affecting trusts, the parties beneficially interested must be made parties. But this rule rule is subject to several exceptions, which are as well established as the rule itself; one of which is, that whenever parties in interest are, or, *from the nature of the case may be*, so numerous that it would be difficult or impracticable to bring them all before the court, and their rights are such as may be fairly and fully represented, and tried without joining them, the application of the rule will be dispensed with. In the case we are considering the trustee was a proper person to represent and defend the interest of his *cestui que trusts;* and to have required the complainants, *at their peril*, to ascertain and bring in every person holding or beneficially interested in any one of the bonds, would have been to impose upon them a task most difficult, if not actually impossible to be performed."

In Hays v. Gas Co.,[15] a case where a trustee was created to hold the security for a large number of gas bonds payable to bearer, the court lay down the doctrine thus: "The trustee in such case is usually, if not always, selected and appointed by the company for the convenience and benefit of itself, and those who may become the owners of its obligations. One mortgage to the trustee is all that is required, no matter how numerous the holders of the notes or bonds secured thereby. He is the representative of the common interests of all who may invest in the security. The right of the owner of the debt secured by the mortgage to be represented by him gives additional value to the security, and facilitates the collection of the debt upon its maturity, and consequently enables the company the more readily and easily to realize and obtain the loan desired. * * He is more than a mere mortgagee, holding the naked legal title to the mortgaged property. He not only holds the legal title, under which he could maintain an action to recover the possession upon condition broken, of the property mortgaged, but he has been, by the agreement of the parties, constituted a trustee, and as such, presumptively clothed with the requisite power to act for the holders of the notes, and as the representative of their interests in an action, to collect the debt when matured. Whether the owners of the debt, or beneficiaries under the trust, are numerous are not, he may so act or sue without uniting with him those for whose benefit the action is prosecuted."

In Van Vechten v. Terry,[16] where the facts were that two hundred and fifty persons purchased a tract of land and vested the title thereto in trustees, and an action was subsequently brought to fo foreclose the mortgage, making the trustees sole defendants; Kent, Chancellor, said: "This is one of those cases in which the general rule cannot, and need not be enforced; for the trustees sufficiently represent all the interests concerned; they were selected by the association for that purpose and we need not look beyond them."

In Mead v. Mitchell,[17] it was held that the authority of the code to a trustee of an express trust to sue, authorizes him to be sued, and that in such cases the *cestuis que trust* are to be deemed before the court by representation.

Even where exceptions exist to the general equity rule concerning parties, it has been held without dissent that the trustee could not bind his *cestui que trust*, *pro confesso*, or by his admissions, but in Shaw v. R. R. Co.,[18] a confirmation of a sale of a railroad, to third persons, for a nominal sum, made upon the consent of the trustees of the first mortgage, was supported, where the sale was made with that understanding that the railroad should be by such third persons conveyed to a new corporation, which should issue its bonds to the former bondholders, in lieu of the bonds, but that they should be postponed to a mortgage placed upon the property to complete it, and thus enable the railroad to secure a grant of land theretofore made to it but which was then unearned. Certain bondhoiders who were not parties, and who did not consent to the action of their trustees, attacked the sale, but the court held

[4] 24 Wis. 53.
[5] 29 Ohio St. 330.
[16] 2 Johns. Ch. 197.
[17] 5 Abb. Pr. 92.
[18] 100 U. S. 605.

that although the trustees had exercised an extraordinary power, yet it was a power within the scope of the authority of trustees of that class of securities, and in the absence of fraud or bad faith on their part the sale could not be avoided.

JOHN H. GILLETT.

HOW CAN THE SUPREME COURT DOCKET BE RELIEVED?

In 1789 the population of the United States was less than four millions, while the commerce and business out of which litigation was likely to arise was less than that of any one of at least five of the present States of the Union.

Under the constitution, the supreme court has original jurisdiction in only two classes of cases, those affecting ambassadors and other public ministers and consuls, and those in which a State shall be a party. In all other cases it has appellate jurisdiction. But owing to the great increase in the population and business of the country the number and variety of causes which reach that court by appeal or writ of error is so great that something must be done to relieve the supreme court from the pressure of business upon it, or else the litigation of the country, which for the last few years has been flowing in an ever increasing current towards the federal courts, will be hopelessly blocked, and litigants who are often forced without consent to seek redress in that jurisdiction, will be denied that speedy justice which it is the theory of our laws to award them.

The supreme court is already six years behind in the hearing of cases, while each year adds and must continue to add in increasing ratio to the impossibility of overtaking the business of the country. This condition alone if there were no other reason, would make it important to inquire into the grounds upon which the jurisdiction of the federal courts rests, to see whether or not some relief cannot be found, both to the court and the people. I shall attempt also to show that the people suffer other hardships than such as arise from delay merely.

The theory of the federal government demands that the judiciary shall have jurisdiction as to subject-matters coextensive with those of the other departments of the government. The executive and legislative departments are limited in their powers to such subjects of a purely national character as are expressly delegated by the constitution. It is essential to the true balance of power under our system that the federal judiciary should have exclusive jurisdiction over the same national question as those which come within the power and authority of the other departments. Whatever additional jurisdiction was given by the constitution was conceded, not because of any national necessity growing out of the needs of the government itself, but for certain ulterior reasons, the strength of which depended upon conditions, and fears no longer existing.

Congress and the executive have by the constitution no power over the rights of persons or property of citizens of the States as such. So long as they obey the constitution and laws relating to national affairs, private citizens, domiciled in a State, are as free from the rule or dominion of congress as from the rule or dominion of any other country. It is only in their relations to the national government and in their relations to alien countries with which the national government has treaty obligations, that the general government has or attempts to exercise any authority over private citizens. The jurisdiction of the federal courts is not thus limited. It was not necessary, in the nature of things, that the judicial power over the citizen should have extended any further than to enforce the powers which belong to the other departments of the government.

It was essential that the judicial power should extend to all cases "arising under the constitution, the laws of the United States, and the treaties made under their authority, to all cases affecting ambassadors and other public ministers, and consuls, to all cases of admirality and maritime jurisdiction, and to controversies to which the United States should be a party." It was wise to extend the jurisdiction to controversies between States. But there is another class of cases to which the judicial power of the United States extends which furnishes by far the larger part of the litigation of the federal courts. I refer to controversies between citizens of different States. Aside from the letter of the constitution, which gives to the federal courts jurisdiction over such cases, there is no more reason why the federal courts should interfere to determine ordinary business controversies between citizens of different States than there is why congress should pass laws respecting contracts and other purely business relations between such citizens.

An examination of the proceedings of the constitutional convention of 1787, shows that the jurisdiction of the federal courts over controversies between citizens of different States, was a concession made to the timidity of those delegates who feared, that by entering the federal union, there was danger of some of the weaker States and their citizens becoming the prey of the stronger. The purpose was very manifest on the part of some of these delegates, not only to maintain the political independence of their States, but to secure their citizens against any injustice or oppression from citizens of other States.

During the deliberation of that convention, various drafts of a constitution were submitted by different delegates, none of which extended the jurisdiction of the federal courts beyond such questions as were purely national.

Edmund Randolph a delegate from Virginia,

submitted a series of resolutions as a plan of government the thirteenth paragraph of which read as follows: "Resolved, that the jurisdiction of the national judiciary shall extend to cases which respect the national revenue, impeachment of any national officers, and questions which involve the national peace and harmony."

Charles Pickney of South Carolina proposed a draft, the ninth article of which provided; "That the jurisdiction of the federal courts should extend to all cases arising under any laws of the United States, or affecting ambassadors, other public ministers, and consuls, to the trial of impeachment of officers of the United States, and to all cases of admirality and maritime jurisdiction."

William Patterson, of New Jersey, afterwards a justice of the supreme court, offered a proposition to the convention, the fifth paragraph of which, relating to the federal judiciary, provided: "That it should have authority to hear and determine in the first instance on all impeachments of federal officers, and by way of appeal on all cases touching the rights and privileges of ambassadors, in all cases of capture from an enemy, in all cases of piracies and felonies on the high seas, in all cases in which foreigners may be interested in the construction of any treaty or treaties, or which may arise on any act or ordinance of congress for the regulation of trade or the collection of the federal revenue."

Alexander Hamilton, of New York, proposed a plan of government, which provided for a supreme court which should have original jurisdiction in all cases of capture, and appellate jurisdiction in all cases in which the revenues of the general government, or the citizens of foreign nations were concerned. Congress was to have power to institute courts in each State for the determination of all matters of general concern. These inferior courts while deriving their power from the general government, were to be, to all intents and purposes, State courts.

On the 26th day of July, 1787, "a committee of detail" consisting of Messrs Rutledge, of South Carolina, Randolph, of Virginia, Gorham, of Massachusetts, and Wilson, of Pennsylvania, to whom had been referred the proceedings of the convention to that time, with instructions to arrange and report the same to the convention, made their report in the form of a series of resolutions. The sixteenth resolution read as follows: "Resolved, that the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature, and to such other questions as involve the national peace and harmony."

It will be seen that in none of these propositions was it contemplated that the federal courts should have jurisdiction over purely private controversies between citizens of different States. That these leading minds in the convention should have finally conceded to their timid associates, the more extended jurisdiction of the federal courts over matters which, according to their judgment, were beyond their proper dominion, is another illustration of the historical fact that the great minds in that convention were animated by a spirit of concession, which made them willing to sacrifice matters of even important detail for the sake of accomplishing a union of the States. But even after the labors of the convention were closed and the question of the ratification of the constitution was left to the States, we find several of them objecting, to that clause relating to the jurisdiction of the courts.

Massachusetts in her convention of February 6, 1788, while ratifying the constitution, recommended several alterations and amendments. Among them was one which provided that, "The supreme judicial federal court shall have no jurisdiction of causes between citizens of different States, unless the matters in dispute, whether it concerns realty or personalty, be of the value of three thousand dollars at the least, nor shall the federal judicial power extend to any action between citizens of different States, where the matter in dispute, whether it concerns the realty or personalty, is not of the value of fifteen hundred dollars at least." When it is considered that fifteen hundred dollars a century ago represented a very large sum as compared with the same amount now, and that very few controversies in which so large an amount would be involved were likely to arise in those primitive times, it is clear that the convention of Massachusetts desired to limit the jurisdiction of federal courts to very exceptional cases.

The State of New Hampshire in its convention which ratified the constitution, instructed its delegates in congress to exert their influence to secure certain amendments to the constitution, which were enumerated in their act of ratification. The seventh of the proposed amendments was as follows: "All common law cases between citizens of different States shall be commenced in the common law courts of the respective States, and no appeal shall be allowed to the federal court in such cases, unless the sum or value of the thing in controversy amounts to three thousand dollars."

In New York, the convention which ratified the constitution also suggested certain amendments, and expressed confidence that a convention would be called by congress to ratify and adopt them. Among the proposed amendments was the following: "That congress shall not constitute, ordain, or establish any tribunals of inferior courts with any other than appellate jurisdiction, except such as may be necessary for the trial of cases of admiralty and maritime jurisdiction, and for the trial of piracies and felonies committed upon the high seas, and in all other cases to which the judicial power of the United States extends, and in which the supreme court has not original jurisdiction, the causes shall be heard, tried, and determined in some one of the State courts, with the right of appeal to the supreme court of the

United States, or other proper tribunal to be established for that purpose by the congress, with such exceptions and under such regulations as the congress shall make."

This brief historical reference has been made for the purpose of showing that, even in that early time when State jealousies were keen, and experience had not demonstrated how groundless were any fears of unjust discrimination by the courts of one State against the citizens of another, there were very decided convictions among statesmen against giving the federal courts jurisdiciton over controversies between citizens of different States, a jurisdiction based solely on the grounds of residence.

Judge Story, in his commentaries on the Constitution, while admitting that the necessity for this provision may not stand upon grounds quite as strong as some of the others, insists that there are high notions of State policy and public justice by which it can be clearly vindicated. The learned commentator gives by way of example, some cases in which he thinks the jurisdiction of the federal courts over controversies between citizens of different States, might be indispensable or in the highest degree expedient. The constitution declares that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States. "Suppose," says Judge Story, "an attempt is made to evade or withhold these privileges, would it not be right to allow the party aggrieved an opportunity of claiming them, in a contest with a citizen of the State, before a tribunal at once national and impartial? Suppose a State should pass a tender law or law impairing the obligations of private contracts, or should grant unconstitutional preferences to its own citizens, is it not clear that the jurisdiction to enforce the obligations of the constitution in such cases ought to be confided to the national tribunal?"

To this I answer yes. But the jurisdiction of the national tribunal need not, in such cases as are suggested by the learned committee be made to depend on the residence of the parties. It is secured by that other and more comprehensive provision of the constitution, which extends the jurisdiction to all cases "arising under the constitution and laws of the United States." And in any case where there should be an actual denial of justice on account of the injured party's residence in another State an appeal or writ of error would lie to the Supreme Court of the United States. The denial of a constitutional right, raises a federal question. Ward v. Maryland, 12 Wall. R. 418; Guy v. Baltimore, 100 U. S. R. 434; Webber v. Virginia, 103 U. S. R. 344; Walling v. Michigan, 116 U. S. R. 446. The cases cited are those in which States have sought to discriminate against citizens of other States, but the Supreme Court of the United States has decided all such legislation to be void under the constitution. The question has generally, if not always, been brought into the supreme court by writ of error to the State coart. These cases show the adequacy of the remedy by writ of error, and dispose of the argument that it is essential to the safety of the citizen that he should have the right to bring his action in or remove his suit to the federal court, if it is to be tried in a State of which he is not a citizen.

Congress has always exercised the right to limit the scope of the constitutional provision giving jurisdiction in cases between citizens of different States, by fixing the amount which must be involved, and by prescribing the time and manner for applying for the removal of causes from the State courts. From 1779 to 1887 the amount necessary to give jurisdiction was five hundred dollars. In the latter year it was raised to two thousand dollars. The right of congress to deny the federal courts jurisdiction over controversies between citizens of different States, when the amount involved is less than five hundred dollars or two thousand dollars, cannot be conceded if the letter of the constitution is to be insisted upon. The constitution makes no such limitation; nor does it in terms allow any limitation, but the power of congress to make a limitation has been recognized since the passage of the judiciary act in 1789, and can no longer be questioned. If this power exists, the exercise of it must be left to the discretion of congress, and the limitation can as well be fixed at twenty thousand dollars as at two thousand dollars. This leaves little to be said for the letter of the constitution as a guarantee of this right to the citizen.

Without going into the details of legislation on this subject, which can only weary without instructing the general reader, I will say that until the act of 1887 the amendments to the judiciary act of 1789, made from time to time by congress, and notably those made during and since the rebellion, tended uniformly in the direction of an enlargement of the jurisdiction of the federal courts. As a result of such legislation the small tide of litigation that formerly flowed in federal channels has swollen to a mighty stream, until now, much, if not most of the great litigation of the country is conducted in those courts. Dillon's Removal of Causes. The act of 1887 was the first step in the history of legislation on this subject, tending to curtail the federal jurisdiction. The writer has been assured by the clerks of the circuit courts of the several districts to whom he has applied that the act of 1887 changing the amount necessary to confer jurisdiction from five hundred to two thousand dollars, has reduced the number of cases to one-half.

I have attempted thus far to show that the only foundation for federal jurisdiction in controversies between citizens of different States, is in the letter of the constitution, and that congress has power, while adhering to the letter of the constitution, to limit such jurisdiction to cases of exceptional magnitude, or exceptional character, thereby reducing to a minimum the cases between

private parties over which the federal courts would have jurisdiction. I think it can safely be said that no substantial reason exists why the citizens of one State cannot, except in the extraordinary cases before referred to, secure impartial justice in the courts of any other State, and that no sensible man has any doubt on that point.

The objections to the federal courts having jurisdiction over purely private business in controversies between citizens of different States, solely on the ground of residence, are many and some of them serious. The limits of this article will only admit of a brief reference to a few of them.

1. The accumulation of business in the supreme court is largely due to such cases. Out of 300 cases argued and determined in that court during the year 1886, 155 were cases of a purely private character, which could as well have been tried in the State courts. In 1887 the number was 132 out out of 229. As we have seen the court is several years behind, and unless some relief is afforded, it must soon happen that whoever has any litigation in the United States courts of sufficient magnitude to admit of an appeal to the supreme court will be sure of having something to leave to his heirs. To a plaintiff, whose all perhaps is bound up in such litigation, the delay is oppressive, and often times amounts to a total denial of justice

2. The volume of business makes it necessary to limit the causes in which an appeal or writ of error will lie to the supreme court to those involving considerable sums, at present five thousand dollars. The final determination of all causes involving a less amount is left to the circuit or district judge, without any opportunity for appeal. This is opposed to the practice and traditions of Anglo-Saxon justice. From the time of the *Aula Regis* to the present, the rule in civil cases, has been in England and in America, to give to every litigant who feels himself aggrieved by the judgment of an inferior court, the right of appeal to a superior. The reasons which underlie this almost universal rule are various, but aside from those which are so obvious as to require no mention, I will refer to but one. Chief Justice Jay, in his letter to President Washington, in relation to the powers and duties of the supreme court, then just inaugurated, used this language: "A celebrated writer has said that 'next to doi g right, the great object in the administration of justice should be to give public satisfaction.'" The right of appeal secures, or helps to secure that end.

3. In exercising this jurisdiction in purely private litigation, the federal courts are, of course, administering the laws of the particular States in which the courts are held. The federal courts sitting in Illinois, must enforce the laws of that State in all purely private litigation; in Kansas, the laws of that State; in New York the .aws of that State. There are no other laws to be enforced. Congress has no authority, and has never assumed any, to pass laws that could have any application to such litigation. At the outset the rule was laid down, that, in construing the laws in a particular State, the United States court would be guided by the rulings and decisions of the supreme court of that State. That was but natural and right, because the decisions of the court of last resort in a State are as much a part of the law as the common law or the statutes. But in time a substantial difficulty arose. The courts of the different States have not always followed the same line of reasoning from the same premises, and so have not always reached the same conclusions. On important questions, notably, some affecting the rights and liabilities of municipal corporations, and others which will readily occur to the profession, doctrines have grown up in different States, based upon judicial decisions, which are quite opposed to each other. When such questions reached the Supreme Court of the United States it was forced to abandon the idea of following the decisions of the State courts in all cases, or else to decide the law of a case coming from one State to be so and so, and to be something different when a similar case came up from another State. A decent regard for consistency has driven the Supreme Court of the United States into conflict with the courts of some of the States. The inferior federal courts follow the supreme court, and so we have the anomaly of a man not being able to maintain an action in the State courts, which he will have no difficulty in maintaining if he will put himself in position to bring his action in the United States courts sitting in the same State, and supposed to be enforcing the laws of that State. This is a rock of offense. It approaches a judicial scandal.

4. The last objection which I shall consider is based upon the great extent of territory usually embraced within a judicial district, the consequent increase in the expense of litigation to the parties, and the dissatisfaction with which any man is drawn away from his home to contend for his rights among strangers.

In some of the newer and larger States the extent of country embraced within a single federal districtis equal to the whole of New England, while the places of holding court are hundreds of miles apart. When a citizen is sued in the United States court in one of these States, he is confronted with the alternative of allowing judgment to pass against him by default, or attempting a defense. But as either course will involve him in expenditures the extent of which may be ruinous, one alternative is as appalling as the other. So, likewise, if a citizen of one of the States is forced to bring a suit against a citizen of another State, for example an insurance company organized under the laws of another State, the almost certain removal of the cause by the company to the federal court, by which the plaintiff is forced to prosecute his claim in a distant part of the State, not infrequently results in serious hardship to him, and in some cases to a total denial of justice.

And here let me say, by way of parenthesis, is the secret of the removal. It is not because the insurance company, or other party, has any doubt of obtaining justice in the State court, that the cause is removed, but it is a rule in litigation, as in war, to harass the enemy, and if it can be discovered what the enemy wants done, not to do it. I think the observation of the profession will justify the statement, that if a man has a suit which he does not expect to try, but which he hopes to settle advantageously to himself, he is quite sure to want to commence in the United States court particularly if his opponent will be thereby inconvenienced. It is not that any one doubts the fairness of the States courts, or expects any undue advantage from the federal courts that these things are done, but because the popular dread that attends litigation in distant and unfamiliar tribunals, induces the settlement of even oppressive claims. While we will not stop here to quarrel with human nature for taking all the advantages known to legal strategy, it is the duty of the law-making power to secure the people from all needless burdens of litigation.

It is of the highest moment to the general government that it should not be suspected of fastening the unneccessary burdens upon the people. The strength of the federal union lies not so much in the power of the general government as in the cheerful obedience of the people. The maxim that that government is best which governs least, is especially true of a federal union. The object of a Union is not government. Government antedates union; existing governments unite "to secure domestic tranquility, provide for the common defense, and to promote the general welfare."

In a government like ours it is important that the unit of government should be near to the people, so as to quickly respond to the public will, and to be within easy reach of popular disapproval. The exactions and petty tyrannies of our local authorities, while they may harrass, do not alarm us, because of the assurance we feel, that we can, whenever we care to take the trouble, speedily get relief. But if the same burdens were laid upon us by some distant authority with which we felt ourselves unable to cope, we should feel borne down with them, and oppressed. It is this idea which underlies the commonly accepted American doctrine that so far as is possible, governmental agencies should be localized, and brought home to the people, where they can be easily seen and understood.

Among the instrumentalities of government which the citizen considers as belonging to the domain of local affairs is that of the courts. If compelled to resort to them for protection of his rights of person or property, he regards it for many reasons of the highest importance that such tribunals should be easy of access, and that they should be amenable to such influences as are not alien to him and his neighbors in their home and business life. It is one of the fundamental principles of the common law right of trial by jury that it should be drawn from the vicinage. By that is meant the neighborhood of the parties. It may as well be denied in form as to have it exercised in such a manner as to deprive the citizen of its essential principle.

To conclude, I think the jurisdiction of the federal courts over purely private controversies between citizens of different States, resting solely on the grounds of residence, ought to be done away by constitutional amendment. If not, then such jurisdiction should be so limited by law as to include only cases where the amount in controversy is large. I should find no fault with a local prejudice act, if provision was made in it for a fair hearing of both sides as on a motion for change of venue, before a cause should be brought in or removed to the federal court on the ground of local influence. In all cases of federal jurisdiction, an appeal or writ of error should lie to the supreme court.

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CORPORATION LAW — DIRECTORS TRUSTEES FOR CORPORATION CREDITORS—PRIORTY OF CLAIMS.

OLNEY V. CONANICUT LAND CO.

Supreme Court of Rhode Island, Aug. 10, 1889.

Upon the insolvency of a corporation its directors become trustees for the corporation creditors, hence they are prohibited from taking a mortgage on the corporate property to secure themselves for advances and for their indorsement of the notes of the corporation, in order to obtain priority over a creditor who had begun suit against the corporation for damages or personal injuries resulting from the negligence of such corporation, although such suit was still pending and undetermined at the time the mortgage was executed.

STINESS, J.: The complainants, judgment creditors of the Conanicut Land Company, seek to set aside a mortgage given to the defendants Lippitt, Davis, and Bradford to secure them for advances, and for their indorsements of the notes of the company. The mortgage was given immediately after the complainants had brought suits for damages against the company for negligence, and when the company was insolvent; the agreed statement of facts showing that it had not sufficient assets with which to discharge all its outstanding indebtedness were payment of the same to be demanded when due. Since then the complainants have levied executions on the property of the company. The complainants claim that, as the mortgagees are three of the four directors who voted to give the mortgage, thereby securing themselves, their action is so inconsistent with their fiduciary relation that it should be set aside. No fraudulent act in regard to the giving of the mortgage is alleged other than the fact itself, and, the case being submitted on bill, answer, and agreed facts as to the validity of the mortgage, we have the simple question whether

directors of an insolvent corporation are debarred in equity, by virtue of their positions, from preferring debts due to themselves. In so far as the mortgage is to be regarded as a mere preference, it is not contended that it is invalid. Except as limited by statute, the right of a debtor to prefer a part of his creditors has always been upheld in this State. Dockray v. Dockray, 2 R. I. 547; Elliott v. Benedict, 13 R. I. 463. The vital question is whether a director of an insolvent corporation is to be regarded as a trustee for its creditors. If he is so, the duty of a trustee to a *cestui que trust* is plain. For a trustee to collect his own debt, to the detriment of that of his *cestui*, is a clear breach of fidelity. When one accepts the trust of caring for another's interest, he accepts the attendant duty. It must be admitted that directors of a corporation are not technical trustees. They do not have, in themselves, the title to property which they hold for the benefit of others; and certainly as to creditors, they are under no express trust. The corporation is a legal being, distinct from its stockholders and officers. It may deal with them as individuals, and may owe them debts. It holds its own property, and has the capacity and responsibility of acting for itself. Nevertheless, the conduct of its affairs must, of necessity, be intrusted to officers in whom confidence is reposed, to whom large powers are given, and by whom its property is managed for the common benefit. As corporations have multiplied and have become so greatly concerned in business affairs in recent years, the obligations arising from such a relation have become correspondingly prominent. While the decisions in regard to this relation are not harmonious, it has been generally agreed that directors are trustees for stockholders. This being established, we think it follows naturally that, where the corporation becomes insolvent, and the stockholders have no longer a substantial interest in the property of the corporation, directors should be regarded as trustees of the creditors to whom the property of the corporation must go. If directors, with their office, assume the duty of caring for the interests of stockholders, why do they not also assume the duty, incidentally, of caring for the interest of those who, instead of the stockholders, may come to have claims upon the corporate property?

In speaking of directors as trustees for stockholders, Mr. Justice Miller, in Sawyer v. Hoag, 17 Wall. 610, calls this "a doctrine of modern date;" but as long ago as the time of Lord Hardwicke we find the duties and obligations of a director of a corporation thus clearly set forth: "I take the employment of a director to be of a mixed nature. It partakes of the nature of a public office, as it arises from the charter of the crown. But it cannot be said to be an employment affecting the public government. * * * Therefore committee-men are most properly agents to those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation. * * * By accepting of a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence, and it is no excuse to say that they had no benefit from it, but that it was merely honorary; and therefore they are within the case of common trustees." Corporation v. Sutton, 2 Atk 400. To the effect that officers of a corporation are trustees for stockholders, see Hodges v. Screw Co., 1 R. I. 312; Hoyle v. Railroad Co., 54 N. Y. 314; Koehler v. Iron Co., 2 Black, 715; Railway Co. v. Hudson, 16 Beav. 485, 19 Eng. Law & Eq. 361; Railway Co. v. Magnay, 25 Beav. 586; Hope v. Salt Co., 25 W. Va. 789. Indeed, no cases that we know of deny a fiduciary relation of directors to stockholders, however they may differ in the use of terms to describe it. This relation has led logically to the conclusion that, in case of insolvency, the assets of the corporation being no longer held for the benefit of stockholders, but for the benefit of creditors, the directors owe to the creditors the duty of a trustee. This duty is clearly stated by Clifford, J., in Bradley v, Converse, 4 Cliff. 375; "Assets of an incorporate company are regarded in equity as held in trust for the payment of the debts of the corporation, and courts of equity will enforce the execution of such trusts in favor of creditors, even when the matter in controversy may not be cognizable in a court of law. Such assets are usually controlled and managed by directors or trustees, but courts of equity will not permit such managers, in dealing with the trust-estate, in the exercise of the powers of their trust to obtain any undue advantage for themselves, to the injury or prejudice of those for whom they are acting in a fiducrary relation. Exact equality of benefit may be enjoyed, but the trustees are forbidden to protect, indemnify, or pay themselves at the expense of those who are similarly in relation to the same fund." To the same effect are Bradley v. Farwell, 1 Holmes, 433; Jackson v. Ludeling, 21 Wall. 616; Corbett v. Woodward, 5 Sawy. 403; Stout v. Milling Co., 13 Fed. Rep. 802; Haywood v. Lumber Co., 64 Wis. 639, 26 N. W. Rep. 184; Richards v. Insurance Co., 43 N. H. 263; Railroad Co. v. Bee, 48 Cal, 398, Hopkins' Appeal, 90 Pa. St. 69; Improvement Co. v. Terrell, L. R. 20 Eq. 168. Of the cases cited by the defendants, only three fully sustained their claim that, as creditors of the company, directors may, in the absence of fraud, secure themselves for their own debt, viz,. Burr's Ex'r v. McDonald, 3 Grat. 216; Bank v. Whittle, 78 Va. 737; Garett v. Plow Co., 70 Iowa, 697, 29 N. W. Rep. 395. In the case of Railroad Co. v. Claghorn, 1 Speer, Eq. 545-562, frequently cited upon this point, the mortgage in question was not given to nor was the suit brought against, directors, neither did the court find that the company was insolvent when the mortgage was given. The case depended mainly on a statute. In Stratton v. Allen, 16 N. J. Eq. 229, 232, the court expressed no opinion upon the point taken that the defendant was a trustee by virtue of his office as

director; but did hold that he was not entitled to priority, but must share proportionately with other creditors. This case also depended upon a statute. In Buell v. Buckingham, 16 Iowa. 284, Judge Cole states there was no evidence that the company was insolvent. Judge Dillon concedes that directors are trustees for stockholders, and treats the case as a sale, voidable between trustee and *cestui que trust*, to which a subsequent attaching creditor, having no lien upon the property at the time, could not make objection. Garrett v. Plow Co. depended upon this and other cases in Iowa, which had followed its apparent doctrine. In Burr's Ex'r v. McDonald the question was not discussed upon principle or authority. In Bank v. Whittle the question was elaborately discussed. The cases upon which the court relied were Railroad Co. v. Claghorn, Stratton v. Allen, and Buell v. Buckingham, to which we have referred. Also, Ashurst's Appeal, 60 Pa. St. 290, which was a suit by stockholders, denied on account of laches and absence of fraud, the court saying: "Creditors could have avoided what was done, but the complainants are not claiming as creditors, or through creditors." Smith v. Skeary, 47 Conn. 47, in which the company was supposed to be solvent at the time of the transaction complained of. Also, Gordon v. Preston, 1 Watts, 385; Whitwell v. Warner, 20 Vt. 425; and Sargent v. Webster, 13 Metc. 497,—in neither of which cases was this subject treated of at length, or as an important element of the case.

We think the weight of recent authority regards directors of an insolvent corporation as trustees for creditors, and that this authority stands upon the better reason. If, as Judge Dillon said, the right to collect a debt is "a race of diligence," open alike to both, it must be admitted that it is a race in which the outside creditor is unduly handicapped. The parties do not contend upon an equal footing; and although it is said that the director has only an advantage which results from his position, and which is known to all who deal with the corporation, yet no one would say that an ordinary trustee should be entitled to an unequal start with his *cestui* by means of information received in the discharge of his trust. If, then, the director be a trustee, or on who holds a fiduciary relation to the creditors, in case of insolvency he cannot take advantage of his position for his own benefit, to their loss. The right of the creditor does not depend upon fraud or no fraud, but upon the fiduciary relation.

It is claimed by the defendants that it was agreed they should have security, before the company became insolvent, and that this mortgage was given pursuant to such agreement. We do not think this claim is supported. The answer sets out that in January, 1874, the stockholders authorized the treasurer to execute a mortgage to secure certain directors who indorsed the notes of the company; but nothing was done under this vote. November 22, 1877, the stockholders again voted a mortgage to secure three directors and indorsers in a sum not exceeding $30,000, which mortgage was given. December 4, 1880, in order to rise from a stranger a new loan of $15,000 upon mortgage which was to be a first lien upon the property of the company, the directors, two of whom were persons not now directors or parties to this suit, canceled and discharged their mortgage upon the agreement for new security as aforsaid. This loan was increased in January, 1884, to $23,000, and a new mortgage given. It is not shown, however, that the company made such an agreement. No vote of the company is recited or put in evidence. The directors had no authority under the by-laws to make such an agreement, and it does not appear what would have been the total amount of indebtedness. If the proceeds of the new mortgage paid all the debts of the company, there was nothing due the directors, and their mortgage was properly discharged, with no occasion for such an agreement. If they still held debts, such debts, may have gone above the limit placed in the resolution. But however this may have been, no mortgage was given or demanded during a period of about eight years. In January, 1884, the company adopted by-laws which gave the directors full power to mortgage the corporate property; but for more than four years after this, no demand for a mortgage was made, nor did the directors vote to give one. In the absence of an express agreement, we think the directors had no right, after they became aware of the unprofitable and disastrous state of the affairs of the company, to appropriate its entire property to secure themselves. But they say the complainants were not creditors whose rights they could consider at the time of the mortgage. True, they had not reduced their claims to judgment but the claims existed, and the defendants had notice of them by the commencement of suits. As trustees for creditors, we think the directors were as much bound to care for those who had given them notice of their claims by suits, in case they should succeed in obtaining judgments, as for those whose claims had been already ascertained. Their action was taken with full knowledge that these claims might ripen into judgments entitled to payment from the property of the company. We fail to see that it was any less the duty of the directors to protect these liabilities of the company than those arising upon contracts which the holders were not prosecuting to judgment. If it be said there is a difference, because of a presumption that contracts are made upon the trust and confidence reposed in the directors, it may also be presumed that, with equal trust and confidence in them, the complainants became guests of the hotel, assumed that, they would not, through negligence, allow it to become dangerous to life and health. Our conclusion is that, in view of the fiduciary relation of the directors to the creditors of the company, they are not entitled to priority

over the complainants by virtue of their mortgage.

NOTE.—*Fiduciary Character of Directors of a Corporation.*—Whether or not a director of a corporation is to be termed or called a trustee, in the strict sense of the word, there seems to be no doubt but that his character is fiduciary, being entrusted by others with powers which are to be exercised for the common and general interests of the corporation.[1] "The relation between directors of a corporation and its stockholders is that of trustee and *cestui que trust*."[2] "Persons who become directors of a corporation, place themselves in the situation of trustees, and the relation of trustee and *cestui que trust* is thereby created between them and the stockholders."[3] "They must be held as occupying a fiduciary relation to the stockholders, for, and in behalf of whom they act."[4] Such directors occupy a position of the highest trust and confidence. It is indispensable that they observe the utmost good faith in the discharge of the great powers with which they are thus clothed.[5] They are subject to the strict rules which govern the relations of trustees and *cestui que trust*, regarding all matters touching the discharge of their duties.[6] "Out of the identity of these relations necessarily spring the same duties, the same dangers, and the same policies of the law."[7] These principles seem to be all firmly established and supported by an almost unbroken line of authority.[8]

Are Directors Trustees for the Creditors of the Corporation?—The answers of this question are not in perfect harmony. However, it is believed that the weight of recent authority usually regards these officers as trustees for creditors, when the corporate becomes insolvent. This is the view of the principal case. The sense in which they are regarded as occupying this relation, is presented in notes to Recent Decisions in 22 Central Law Journal 194, where the leading authorities bearing upon the question are cited. The proposition seems to be well sustained that it is the duty of the directors to apply the corporation assests, in event of insolvency, for the benefit of corporation creditors in preference to the claims of stockholders or other persons. Considering the directors as strictly trustees for the creditors it would seem to follow that such officers would be bound to apply the assets ratably among the general corporate creditors. In this connection see "preferences by directors in their own favor" in 19 CENTRAL LAW JOURNAL 368, 369, where this question is considered.

Preferences by Directors.—In the absence of statutory prohibition, a corporation may sell and transfer its property, and may prefer one creditor to another, although it is insolvent.[9] And it has been held that there is nothing in the policy of the statute of West Virginia that forbids an insolvent corporation to prefer creditors.[10] Likewise, it has been held that in New Jersey that the preference of one creditor of a corporation over others, by means of a mortgage on corporate property, is not now prohibited by law, or objectionable in itself.[11] But as between the creditors of a corporation and its stockholders, the property will in equity be first appropriated to the payment of the creditors.[12] In Adams v. Kehlor Milling Co.,[13] the directors, knowing that the corporation was insolvent, granted a preference to the estate of a deceased director and president of the corporation. At the date of the preference the board consisted of but three persons, two of whom were brothers of the deceased directors, and one of whom was agent of the deceased's estate, and voted his stock at the corporate meeting. The preference was declared illegal on the complaint of an unsecured judgment creditor of the corporation and the law permitted him to recover of the directors such percentage of his debt as he would have received if the sum wrongfully paid by way of preference had been divided *pro rata* among all the unsecured creditors.[14] However, in Iowa, it has been held that where a corporation is indebted to its directors, who, in good faith, take a mortgage on the property of the corporation for security, thus obtaining a preference over other creditors, they may enforce such security the same as any other creditor, even though they participate in the management of the corporate business in such a way as to permit the accumulation of a debt beyond the allowed limit, and although the corporation was insolvent when the mortgage was taken.[15]

* * *

1 Hoyle v. Plattsburg, etc. Rd., 54 N. Y. 314, 328.

2 Butt v. Wood, 38 Barb. (N. Y.) 188.

3 Per Romilly, M. R., in The York & Midland R. R. v. Hudson, 16 Beav. 499.

4 Per Appleton, C. J., in European, etc. R. v. Poor, 59 Me. 277.

5 Morawetz on Prin. Corp., § 243 and cases; Green's Brices *Ultra Vires*, 477, 478, n. a.; 3 Pomeroy's Eq. Jur., §§ 1088-1090; Pierce on Railroads, 43 and cases; Ewell's Evan's Agency, *276; Wood's Field's Corp. (2d Ed.), §§ 154, 155; Band v. Downey, 53 Cal. 463; Corbett v. Woodward, 5 Saw. C. C. 403; Cumberland Coal Co. v. Sherman, 30 Barb. 553, 559; Pearson v. Concord R. (N. H.), 16 Reporter, 463 and cases; Port v. Russell, 36 Ind. 60; Hall v. Bridge Co., 8 Kan. 466.

6 Luxembourg R. Co. v. Magnay, 25 Beav. 586; Wardell v. Railroad, 103 U. S. 657, 658 and cases; 4 Dill. C. C. 330; 19 Cent. L. J. 559; Bliss v. Matteson, 45 N. Y. 22; 52 Barb. 335; Robinson v. Smith, 3 Paige Ch. 222; 24 Am. Dec. 212; Koehler v. Black River, etc. R. Co., 2 Black, 715, 720; Flicraft's Case, 21 L. R. Ch. Div. 519; 52 L. J. (N. S.) 27; Charitable Corporation v. Sutton, 2 Atk. 404; San Diego v. Railroad, 44 Cal. 106; Jones v. Morrison, 31 Minn. 140.

7 Bedford v. Browser, 48 Pa. St. 29; Overend Gurney Co. v. Gibb, 42 L. J Ch. 67; L. R. 5 Eng. & Irish App. 480; Abbott v. Am. Hard Rubber Co., 33 Barb. 578.

8 See Bent, Rec., etc. v. Priest, 86 Mo. 475 and cases. See note to this case in 25 Am. L. Reg. (N. S.), pp. 125-133; Ward v. Davidson, 89 Mo. 445; 1 S. W. Rep 846; 6 Western Rep. 367; Bennett v. St. Louis Car Roofing Co., 22 Cent. L. J. 592, and note pp. 593, 594; 19 Mo. App. 349; "Directors of Corporations," 19 Cent. L. J. 305 310, 327-330; "Whether Directors are Trustees for Shareholders," 20 Cent. L. J. 222; The Twin Lick Oil Co. v. Marbury, 91 U. S. (1 Otto) 587; 3 Cent. L. J. 98; Stark v. Soule, 52 N. Y. Super. Ct. (45 Hun) 588; 9 N. Y. State Rep. 555; Thomas v. Sweet, 37 Kan. 183; 14 Pac. Rep. 545.

9 Wilkinson v. Bauerle (N. J.), 7 Atl. Rep. 514; Berger v. Porpoise Fishing Co. (N. J.), 8 Atl. Rep. 523.

10 Pyles v. Riverside Furniture Co. (W. Va.), 2 S. E. Rep. 909 and note.

11 Vail v. Jamieson (N. J.), 7 Atl. Rep. 520. See Conner v. Todd (N. J.), 7 Atl. Rep. 477.

12 Poole v. West Point, etc. Assn., 30 Fed. Rep. 513.

13 35 Fed. Rep. 433. See note to this case at p. 436.

14 Koehler v. Black River Falls Co., 2 Black, 720; Drury v. Cross, 7 Wall. 299; Bradley v. Farwell, 1 Holmes, 433; Corbett v. Woodward, 5 Sawy. 417; Richard v. Ins. Co., 43 N. H. 263; Lippincott v. Carriage Co., 25 Fed. Rep. 586.

15 Garrett v. Burlington Plow Co., 70 Iowa, 697; 29 N. W. Rep. 395; Buell v. Buckingham, 16 Iowa, 284; Bank v. Wasson, 48 Iowa, 336; Hallam v. Indianola Hotel Co., 59 Iowa, 178. See Hayward v. Lincoln Lumber Co., 64 Wis. 639; 26 N. W. Rep. 184; McMurtry v. Montgomery, etc. Co., 5 S. W. Rep. 570; Wasatch Milling Co. v. Jennings, 15 Pac. Rep. 65; Street v. Old Town Bank of Baltimore, 67 Md. 421, and note to same case in 19 Am. & Eng. Corp. Cas., pp. 121, 122.

RECENT PUBLICATIONS.

COMMENTARIES ON THE NON-CONTRACT LAW, and especially as to Common affairs not of Contract on the Every-day Rights and Torts. By Joel Prentiss Bishop, Honorary Doctor Juris Utriusque of the University of Berne. Chicago: T. H. Flood & Co., Law-Book Publishers. 1889.

We have had this book on our table, awaiting a review, for a long time. We have repeatedly examined and studied it, with a view to determining in our own mind what the subject of the book is and whether it is as meritorious a work as the ability and reputation of its author would incline us to think. The latter question we found easy of solution, the former one more difficult. Indeed, we are free to say that as to the subject and name of the book we are as yet somewhat in darkness. We understand very well what "non-contract law" means or ought to mean. But why so awkward a name should have been selected for so gracefully written a book, we are at a loss to understand. And this, notwithstanding the fact that we have repeatedly read the preface in which the talented author undertakes to explain the reason of its nomenclature. After all that he has said by way of justification of the use of the name "non-contract law" instead of "Torts" or "Wrongs" we go through the book and find little that should not properly appear in a work on the latter subjects. All this with great deference to the learned author's opinion, who like any other parent ought to be conceded the right to name his offspring as it pleases him.

But no matter what it is called, it is an exceedingly valuable work and fully sustains the great reputation of Mr. Bishop. It is written after the condensed method of the author's recent work on "Contracts" employing the short forms of expression, rejecting superfluous words, stating the legal doctrines without repetitions, illustrating the several doctrines by only so many instances as will render them and their applications plain, and citing large number of cases wherein the practitioner, investigating a particular question, can find the desired further illustrations and explanations. It is impossible within the limits of this article to give more than a resume of what it contains. In addition to the common and ordinary heads of Torts it treats of the governmental control of person and property, one's right to deal as he will with his own person, property and interests, doing what the law permits or requires, discharging the social duties, disobeying the law, wilfully injuring others, carelessly injuring others, necessity and the inevitable, the equipping and running of railroads, going upon and crossing railroads, traveling by rail, traveling by street cars, traveling by other public conveyance, traveling by private conveyance and on foot, baggage, hotels and boarding houses, sending parcels, mail, telegraph and telephone communication, injuries by and to animals, specially of dogs, hunting and fishing, sports, pastimes and public exhibitions and performances, death, wrongs out of the State or country, all of which in our view are either "Torts" or "Wrongs" or lead up to them. The notes and citations are very extensive and thorough, and the index prepared by Mr. Bishop himself, in every respect complete, as it must needs be in a work containing so much apparently extraneous matter. The book contains 800 pages, and in mechanical execution is first class.

THE AMERICAN COMMONWEALTH. By James Bryce, author of "The Holy Roman Empire," M. P., for Aberdeen. In two volumes, London: Macmillian & Co. & New York. 1889.

We have repeatedly, in our editorial column, made use of many of the good things that appear in this work, and do not consider it necessary at this time to enter into an extended review of a book, with which the intelligent portion of the profession must be more or less familiar. Suffice it to say that it is the recorded opinion of an Englishman of rare learning and discernment, as to the political, civil and judicial systems of this country. The style is admirable and the statements generally accurate and free from apparent bias. Extending through the volumes will be found much of interest to lawyers, and, strange to say, many things about their own country, which they will be surprised to learn for the first time from the pen of a foreigner. The chapters on the working of the courts of this country — the comparision between European and American systems — the development and amendment of the Federal Constitution and its interpretation—and the chapter on the bar of America, all will be found especially worthy of study. To those who have not had an opportunity of examining the work, we unhesitatingly say that there is no modern work which is better calculated to enlighten and instruct upon the subjects of which it treats.

HUMORS OF THE LAW.

In a Mississippi court, a man brought an action to recover damages for the death of his dog, which the defendant had shot. A slow-speaking old darkey familiarly called Uncle Sam was put on the stand to prove the value of the deceased. Lawyer: Did you know anything about that dog, Sam? Witness: I reckon I did, I knowed him ever since he war a pup. Lawyer: Well, what kind of a dog was he? Witness: He was a big yaller dog. Lawyer (impatiently): I don't mean how did he look, but what sort of a dog was he——could he hunt?——was he a guard? Witness: He couldn't do nothin' as I knowed on, 'cept eat, and sleep, and lay roun' an' holler and make a fuss. I 'spect dat's what made 'em call him——Lawyer: Well—what did they call him? Witness: Well, sah, dey used to call 'im *Lawyah*!

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCORD AND SATISFACTION. — A compromise of a suit by an assignee to recover land conveyed in fraud of creditors, on payment of the costs by the defendant therein, on consideration that the assignee relinquish the claim and would not again sue upon it, under a de

cree of the court of insolvency allowing the same, is sufficient proof of accord and satisfaction, where the authority of the assignee to compromise is not questioned, and is a bar to another action by a subsequent assignee on the same cause of action. — *Dana v. Taylor*, Mass., 22 N. E. Rep. 65.

2. ADMINISTRATORS—Claims.—Debts which are privileged on all movables in general must be paid in the order named in Rev. Civil Code, art. 3191, and those which are privileged on movables and immovables must be paid in the order specified in Rev. Civil Code, art. 3252.—*Succession of Duhe*, La., 6 South. Rep. 502.

3. ADMIRALTY—Shipping.— Proceedings of the United States district court, under admiralty rule 54, United States Supreme Court, and §§ 4283-4285, Rev. St., the act of congress of June 26, 1884, and § 4289, Rev. St., as amended by act of June 19, 1886, to limit the liability of ship-owners for loss or damages to persons or goods, supersede all other actions and suits for the same damages in the State or national courts, upon the matters being properly presented therein. — *Black v. Southern Pac. R. Co.*, U. S. C. C. (Cal.), 39 Fed. Rep. 565

4. ADMIRALTY—Shipping.— A bill of lading exempting the vessel owners from liability for "damage done by vermin" does not exonerate them from responsibility for injuries by rats, resulting from their negligence in omitting to fumigate the ship before loading, and the burden of proving that the injuries were not the result of such negligence is on the owners. — *Stevens v. Navigazione General Italiana*, U. S. D. C. (N. Y.), 39 Fed. Rep. 562.

5. ADMIRALTY—Maritime Liens.— After return from a foreign voyage, a coasting trip for repairs and to earn frieght on the way to the port of loading for abroad again is to be considered a voyage, when the contemplated foreign voyage is broken up by seizure of the vessel; and creditors on this domestic trip will be paid in full, although no funds will remain to satisfy those of the late foreign voyage. — *The Augustine Kobbe*, U. S. C. C. (Ala.), 39 Fed. Rep. 559.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS. — Under Gen. Laws N. H. ch. 140, allowing one month after the filing of an assignment for benefit of creditors for the presentation of claims against the debtor, unless the judge of probate, upon cause shown, shall give a further time, a decree of distribution is unauthorized where none of the claims are proved within one month after the filing of the assignment, and further time is not given by the judge. — *Tucker v. Beacham*, N. H., 18 Atl. Rep. 234.

7. ATTACHMENT—Joinder of Causes.—A cause of action in a petition upon a debt not fraudulently contracted, if coupled with a cause of action upon a debt which was fraudulently contracted, and an order of attachment covering both counts issued upon an affidavit alleging that "said defendant fraudulently contracted the debt and incurred the obligation for which this suit is brought:" *Held*, to vitiate such order of attachment and justify its discharge. — *Myer v. Evans*, Neb , 43 N. W. Rep. 109.

8. ATTORNEY AND CLIENT— Lien. — Nature, origin, and scope of the summary remedy by rule which courts may exercise against attorneys at law, as officers of court, considered. —*Butchers' Union Slaughter-house, etc. Co. v. City Live-stock Landing, etc. Co.*, La., 6 South. Rep. 508.

9. ATTORNEY— Administrator De Son Tort.— When an attorney at law or other person acting as agent for another, known to him to be without authority or right, takes possession of the personal property of a deceased person and converts it into money, without administration, he will be liable to the lawful administrator for the value of the property so converted and appropriated, without reference to whether he accounts to the person for whom he acts or not. —*Stevenson v. Valentine*, Neb., 43 N. W. Rep. 107.

10. CONTRACT—Performance.— When a party has substantially complied with the terms of a contract which he is to perform to the satisfaction or approval of the other party, whereby the property of the latter has been materially benefited, the improvements and benefits being of such a character that they must necessarily be appropriated and retained by the party for whom they are made, the contractor is entitled to recover upon his contract. — *O'Dea v. City of Winona*, Minn., 43 N. W. Rep. 97.

11. CRIMINAL LAW—Confessions. — Where evidence is offered to show the confession of a party charged with crime was voluntary, and the evidence is objected to because the confession was induced through improper influences, it is error in the court to refuse to inquire into whether or not the confession was voluntarily made, and to submit such question to the jury. Such a question is to be decided by the court, and not by the jury.—*Murray v. State*, Fla., 6 South. Rep. 498.

12. DEED—Parol Evidence. — Plaintiff and others, by absolute deed, conveyed mining property to persons to whom plaintiff and one of the grantors, who had no interest in the property, were indebted, and about two months thereafter the creditors executed an agreement to reconvey one-third of the property to plaintiff when the creditors had realized sufficient to cancel the indebtedness due them: *Held*, that parol evidence was admissible to show the consideration for both the deed and the agreement, and to show that the latter was executed in pursuance of a parol agreement made at the time of the conveyance.—*Adams v. Lambard*, Cal., 22 Pac. Rep. 180.

13. DIVORCE — Alimony. — In a divorce suit the real property which comes to the wife as a result of the divorce is not the subject-matter of the litigation. The court has no jurisdiction to affect or divest the title of the husband to lands owned by him, or to decree one-third of them to the wife, independent of a decree for divorce. Nor has the plaintiff any title upon which to base a suit to recover any portion of the same, except as it comes by force of the statute upon a decree for a divorce.—*Houston v. Timmerman*, Oreg., 21 Pac. Rep. 1037.

14. EASEMENT — Licenses. — An oral permission given by the owners of realty to an adjoining owner to build on and let timbers into a wall standing on the former's land, of which the wall was to remain a part, passes no estate in the realty, but creates a license only, revocable at the will or by the death of the owner, or by his alienation of the land. — *Hodgkins v. Farrington*, Mass., 22 N. E. Rep. 73

15. EJECTMENT—Joinder.—Under Code Civil Proc. Cal. §§ 427, 1048, providing that claims to recover specific real property may be united in the same complaint, and that two or more causes of action pending at the same time between the same parties, and in the same court, upon causes of action which might have been joined, may be consolidated, two actions of ejectment brought in the same court, at the same time, between the same parties, to recover separate tracts of land in the same county, are properly consolidated. — *Smith v. Smith*, Cal., 22 Pac. Rep. 186.

16. EJECTMENT—Adverse Possession.—In an action of ejectment, if defendant has been in adverse possession of the land in controversy for the length of time required under the statute to bar recovery, it is immaterial whether that possession immediately preceded the institution of the suit or not.—*Goeghegan v. Marshall*, Miss., 6 South. Rep. 502.

17. EJECTMENT—Evidence.—Under the provisions of § 18, of ch. 73, of the Compiled statutes of 1887, the record of a deed duly recorded, or a transcript thereof duly certified, may be read in evidence, with like force and effect as the original deed, whenever, by the party's oath or otherwise, the original is known to be lost, or not belonging to the party seeking to use it, or within his control, and therefore, in an action in ejectment, where the defendant seeks to prove title in a stranger as a defense, and it sufficiently appears that the original deed does not belong to him, a copy of the record will be competent evidence in the first instance, with-

out proof of the loss of the original, or that it is not under the control of the party seeking to use it. — *Buck v. Gage*, Neb., 43 N. W. Rep. 110.

18. ELECTIONS AND VOTERS — Woman Suffrage. — The mother of a child included in the school census in the district, who had resided therein more than three months, and was more than twenty-one years of age, was entitled to vote at a school meeting for school trustees, though the constitution of Michigan limits the right of suffrage to males, as the constitutional qualifications do not apply to officers for which the legislature has the right to provide, among which are school trustees.—*Belles v. Burr*, Mich., 43 N. W. Rep. 24.

19. EQUITY—Accounting.— Plaintiff bought of defendant certain standing timber, to cut into hoops, to be paid for at a fixed time. There was a dispute as to the measurement, plaintiff claiming that he had paid for all timber cut. Defendant replevied certain hoops, alleging that they had not been paid for, and, on judgment in his favor, plaintiff, having sold the hoops, paid defendant their value, and sued defendant for the amount paid in excess of the balance alleged by plaintiff to be due: *Held*, that the money paid to defendant took the place of the property, and was subject to the same remedies, and plaintiff was entitled to an accounting. — *Crawford v. Edgerton*, U. S. C. C. (Ind.), 39 Fed. Rep. 523.

20. EXECUTION—Exemptions. — Where a debtor owns property not exceeding the amount exempt from execution, though such ownership is unknown to the sheriff, he and his bondsmen are not liable for his failure to levy execution upon said property, in the absence of a showing that the judgment upon which the execution issued was rendered for a tort.—*State v. Harper*, Ind., 22 N. E. Rep. 80.

21. EXECUTOR—Bond.— The statutory right of creditors to have the real property of a decendant's estate sold for payment of their claims by proceedings in the probate court is not destroyed nor affected by the executor's giving a bond as residuary legatee for payment of debts and legacies, under How. St. Mich. § 5836, as amended by Pub. Act No. 169, Laws 1887, providing that, if an executor, etc., be also the residuary legatee, he may, instead of giving the usual executor's bond, "give a bond in such sum and with such sureties as the court may direct, with a condition only to pay all the debts legacies of the testator; and in such cases he shall not be required to return an inventory."—*Lafferty v. People's Sav. Bank*, Mich., 43 N. W. Rep. 34.

22. GARNISHMENT—Parties.—Rev. St. Wis. § 2766, provides that "the proceedings against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant as parties defendant, and all the provisions of law relating to the examination of parties shall be applicable thereto:" and section 2765 provides that the defendant may participate in the trial of any issue between the plaintiff and garnishee for the protection of his interests. *Held*, that such an action, which is at issue as to the garnishees, is at issue as to a defendant who has not answered, within the meaning of Rev. St. Wis. § 4096, as amended by Laws 1889, c. 348, providing that "the examination of a party otherwise than as a witness on a trial may be taken by deposition in any action or proceeding at any time after the commencement thereof, and before judgment."—*Mygatt v. Burton*, Wis. 43 N. W. Rep. 100.

23. GIFTS CAUSA MORTIS—Promissory Notes.—A promissory note made without consideration in anticipation of and shortly before the maker's death, and intrusted by him to a third person, with directions not to deliver it to the payee, the maker's son, until six months after the maker's decease, is not good, either as a bequest or as a gift *causa mortis*, and is unforceable.—*Sanborn v Sanborn*, N. H. 18 Atl. Rep. 223.

24. HUSBAND AND WIFE.—Evidence is admissible from a surviving husband to show error in an act reciting that certain real estate was acquired by his wife with her paraphernal funds, and for her separate benefit and advantage, although he was a party to the act.—*Succession of Bellande*, La., 6 South Rep. 505.

25. INJUNCTION—Acts Pending Suit.—A party denying a right of drain claimed and exercised by an adjoining proprietor, and having applied to the courts by an injunction suit to settle the disputed right, is bound to respect the *status quo* during the pendancy of the suit.—*State v. Duffel*, La., 6 South Rep. 512.

26. INJUNCTION—Attachment. — Injunction will lie to restrain the sale of land under a judgment in an attachment suit upon proof that the land was occupied, while the return made on the attachment writ, levied on the land, was that provided by law in the case of wild, uncultivated, or unoccupied land.—*Sherman v. Union Nat. Bank*, Miss., 6 South Rep. 501.

27. JUDGMENT—Void.—The entry of a void judgment does not operate as a discontinuance of the cause.—*Moore v. Hoskins*, Miss., 6 South Rep. 500.

28. LANDLORD AND TENANT.—A sublessee, who holds over after his lessor has surrendered to the orignal lessors, and who is informed of such surrender, and thereafter pays rent to his own lessor as agent for the original lessors, and endeavors to optain a new lease from the latter, acquiesces in their possession, and becomes their tenant at will, and his rights under the sublease are terminated.—*Appleton v. Ames*, Mass., 22 N. E. Rep. 69.

29. MINES AND MINING—Conveyance.—The term "mining ground," as used in Laws Cal. 1880, p. 131, providing that it shall not be lawful for the directors of any mining corporation to sell or dispose of the mining ground of the corporation without the consent or ratification of the holders of two-thirds of the capital stock, in writing, signed by such stockholders, or by resolution duly passed at a stockholders' meeting, includes a ditch and water-right, by means of which a mine is operated, as an appurtenance thereof.—*McShane v. Carter*, Cal., 22 Pac. Rep. 178.

30. MORTGAGE— Fixtures. — Under Civil Code. Cal. § 2929, providing that "no person whose interest is subject to a lien of a mortgage may do any act which will substantially impair the mortgagee's security," a complaint alleging that one of defendants had executed a mortgage on certain realty to plaintiff; that defendants detached and removed certain permanent fixtures, thereby impairing plaintiff's security, which they well knew; that plaintiff thereafter foreclosed and failed to realize the amount of his mortgage claim; that defendant mortgagor was insolvent; and that a personal judgment for the deficiency was entered and remained unsatisfied, — states a cause of action. — *Lorenson v. Standard Soap Co.*, Cal., 22 Pac. Rep. 184.

31. MORTGAGES—Agreement for Security.—A written agreement for security on certain property for the payment of a debt is in equity a mortgage, and will be enforced as such against all parties to the agreement, and those who have notice of it.—*Gest v. Packwood*, U. S. C. C. Oreg., 39 Fed. Rep. 525.

32. MUNICIPAL CORPORATION—Defective Sidewalks.—A city tore up a sidewalk at the intersection of two streets, excavating under it, and making a portion of it a part of one of the streets. Plaintiff slipped on the place where the sidewalk formerly was, and fell into the excavation and was injured: *Held*, the city was liable if, after removing the cross walk, it did not make the descent into the excavation safe, or protect it, if dangerous, by lights or barriers. When the city tore up the sidewalk, and by the excavation, made it a part of the street and allowed it to remain so, they became liable to plaintiff if his fall was caused by such acts, and he was without fault.—*Alexander v. City of Big Rapids*, Mich., 42 N. W. Rep. 1071.

33. NEGLIGENCE—Pleading.—In an action for personal injuries the complaint contained two counts, both alleging that the injuries were caused by negligence of defendant's street-car driver; the second further alleged that the street at the place of the injury, and the car by which it was caused, were out of repair, and that defendant was negligent in allowing them to re-

main so, but did not allege that such condition of the street and car contributed to the injuries complained of. *Held*, that the only negligence alleged as the direct cause of the injury was that of the driver, and a refusal to require the plaintiff to elect between the two counts was not prejudicial error.—*Shenners v. West Side St. Ry. Co.*, Wis., 43 N. W. Rep. 103.

34. NEGLIGENCE—Gross Negligence.—A party is guilty of gross negligence if he fails to exercise the care required of him by the law. This care required by the law is such care as is necessary under the circumstances to secure the protection of the lives, persons, and property of other persons.—*Shumacher v. St. Louis & S. F. R. Co.*, U. S. C. C. (Ark.), 39 Fed. Rep. 174.

35. NEGOTIABLE INSTRUMENNT—Indorsement before Delivery.—A non-negotiable note indorsed prior to its passing to the payee is not evidence *per se* of a contract by such indorser on which an action may be maintained.—*Building & Loan Soc. v. Leeds*, N. J., 18 Atl. Rep. 82.

36. NEGOTIABLE INSTRUMENTS.—It is no defence to an action on a promissory note that the payee, plaintiff's intestate, agreed, before its maturity, with a third person, for a valuable consideration, not to sue defendant, the maker thereon, especially where defendant made a payment on the note, thus recognizing its validity, after such agreement, and it is immaterial that the third person with whom the agreement was made was defendant's father.—*Marston v. Bigelow*, Mass., 22 N. E. Rep. 71.

37. OFFICE AND OFFICERS—Injunction.— Proceedings by injunctiou cannot be used as a means of determining disputed title to office; but they may be properly used to protect the possession of officers *de facto* against the interference of claimants whose title is disputed, until the latter shall establish their title by the judicial proceeding provided by law.—*Guillotte v. Poincy*, La., 6 South Rep. 507.

38. PARTNERSHIP—Receivers.—A receiver of partnership assets, appointed by a competent court of another State, may maintain an action in this State to set aside a sale of partnership assets situate in this State, made by one partner in fraud of the other partner, when there are no creditors of the partnership, and the only person to be benefited is the partner who is defrauded.—*Sobernheimer v. Wheeler*, N. J., 18 Atl Rep. 234.

39. PLEADING—Judgment.—In pleading a judgment it is unnecessary, after alleging the giving and entry of the judgment, to allege further that said judgment was in full force, and not appealed from.—*Carter v. Paige*, Cal., 22 Pac. Rep. 188.

40. POST OFFICE—Charges of Fraud.—Where an account of a postmaster, regular on its face, has been adjusted and allowed by the proper accounting officers, and fully paid such officers cannot, after the term of office of the postmaster has expired evolve *ex parte* a balance in favor of the goverment, founded solely upon a general and vague allegation of fraud in accounts formerly passed upon, so as to make such balance *prima facie* evidence against the postmaster and his sureties. Such allegations must be specific, and sustained by competant evidence.—*United States v. Hutcheson*, U. S. C. C. Ga., 39 Fed. Rep. 542.

41. PRACTICE IN CIVIL CASES.—In an action on a joint contract against several defendants, where only one is served with process, but another voluntarily appears within the statutory time, Rev. St. Wis. § 2884, subsec. 1, providing that "if the action be against several persons jointly indebted, he [plaintiff] may proceed against the defendant served, unless the court shall otherwise direct," does not authorize the court to proceed as to the defendant actually served only as Rev. St. Wis. § 2643, provides that a voluntary appearance is equivalent to personal service.—*Nichols v. Crittenden*, Wis. 43 N. W. Rep. 105.

42. PRINCIPAL AND AGENT.—A principal is bound by the acts of his agent to the extent of the apparent authority conferred on him.—*Lorton v. Russell*, Neb., 43 N. W. Rep. 112.

43. QUIETING TITLE.—A bill in equity to establish a title acquired by purchase at an execution sale under a judgment by default in complainant's favor will not be entertained where the proof shows that the debt on which the judgment was obtained had been fully paid before the commencement of the action.—*Burt v. Collins*, U. S. C. C. Ill., 39 Fed. Rep, 538.

44. REPLEVIN—Waiver of Tort.—Where the vendor of goods obtained by fraud replevies a portion, his right to recover them is not lost by bringing trover for the remainder, and waiving the tort for the purpose of garnishing the defendant.—*Singer v. Schilling*, Wis. 43 N. W. Rep. 101.

45. SALE—Warranty.—Where a bull-calf at the time of sale is but three months old, free from apparent defect, and present to the view of the purchaser, it cannot be held as a matter of law that his sterility, which transpired two years later, existed at the time of sale, and that there was an implied warrenty that he would possess the power of procreation at maturity.—*White v. Stelloh*, Wis. 43 N. W. Rep. 99.

46. TAXATION—Exemptions. — Land dedicated by the legislature to the perpetual use of the public as a burial ground, and exempted from all public taxes, is not taxable under Pub. St. Mass. ch. 50, which authorizes the proper officers of towns and cities to build drains and sewers, and to levy assessments upon all owners of real estate deriving benefit therefrom in proportion to the frontage of such realty on the street in which the sewer is laid, and constituting such assessments liens upon real estate assessed, where no use is made by the cemetery of a sewer erected thereunder, as it derives no benefit therefrom, and cannot be sold for the taxes if assessed. — *Proprietors of Mt. Auburn Cemetery v. Board*, Mass., 22 N. E. Rep. 66.

47. TAX-TITLES— Trust-estate. — Although a tax-title to land acquired by one who holds the legal title to the land in trust to secure the payment of a debt is also held in trust, yet where the debtor was in possession, claiming ownership, when the tax assessment was made, and failed to pay the taxes, he can only demand a conveyance of the trustee's interest on payment of the amount of the debt, taxes, costs, and interest. — *Ward v. Matthews*, Cal., 22 Pac. Rep. 187.

48. TELEGRAPH COMPANIES — Negligence. — If a message is written by the sender on a telegraphic blank containing stipulations restrictive of the right of recovery in case of negligence in the transmission of the message, he is bound by such stipulations whether he reads them or not; no fraud or imposition being used to prevent him from acquainting himself with their purport. — *Beasley v. Western Union Tel. Co.*, U. S. C. C. (Tex.), 39 Fed. Rep. 181.

49. WATERS AND WATER COURSES. — Ordinance 1647, gave to the proprietor of upland property in the shore between high and low water mark where the sea did not ebb more than a certain distance, subject to the public right of fishing, passage, etc., and provided that such proprietor should not have power to hinder the passage of vessels "to other men's houses or lands:" *Held*, that the owner of uplands not accessible by navigation from the sea had no right to have the tide ebb and flow to her premises over the flats owned by others, for the purpose of drainage, so as to entitle her to damages for the filling up of such flats by which such ebb and flow was prevented. — *Henry v. City of Newburyport*, Mass., 22 N. E. Rep. 75.

50. WILLS—Contingent Interests.—Where there was a devise to A for the joint lives of himself and B, and in case of the termination of those joint lives by the death of B, to A in fee, and in case of the termination of those joint lives by the death of A, to C and D in fee, and if C be then dead, to D alone in fee, the contingency is not as to the person who shall take, but as to the event upon the happening of which a certain person shall take.—*Wilkinson v. Sherman*, N. J., 18 Atl. Rep. 228.